Supreme Court of the United States

OCTOBER TERM, 1902.

No. 77.

WILLIAM E. HALE, AS RECEIVER FOR THE COLLECTION AND ENFORCEMENT OF THE LIABILITY OF STOCKHOLDERS OF THE NORTHWESTERN GUARANTY LOAN COMPANY (A CORPORATION), PETITIONER,

vs.

EDWARD P. ALLISON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPLICATION FOR REARGUMENT.

Now comes the above-named petitioner and respectfully petitions this honorable court for a rehearing of the above-entitled cause for the following reasons, to wit:

1. Because of misinterpretation and misconception of the local law of the State of Minnesota, as indicated and established in the decisions of the supreme court of that State, cited and relied upon in the opinion of this honorable court in the case at bar.

2. Because of misconception in matters of fact bearing upon and decisive of the interpretation and meaning of the local law of Minnesota, as interpreted by the decisions of the supreme court of that State, cited and relied upon in the opinion in the case at bar.

3. Because the erroneous construction and interpretation of the local law of Minnesota in the particulars above mentioned has been made the basis of the decision of this court in this cause adverse to your petitioner.

This petition is made and presented upon the grounds hereinbefore specified, supplemented by the statement and accompanying argument hereto annexed, referred to, and made a part hereof.

And your petitioner prays that an order may be made for a rehearing of the argument in this case on a day to be appointed by the court and upon such points as the court may direct.

W. E. HALE AND
M. H. BOUTELLE,
Attorneys for Petitioner.

I hereby certify that I have examined the foregoing petition for rehearing, with annexed statement and argument, and that the same is presented in good faith, and that I believe the same to be based on meritorious grounds.

JAMES K. REDINGTON, *Counsel.*

STATEMENT AND ARGUMENT.

Before discussing the several grounds above specified, a brief statement of the condition of this litigation and the reasons rendering this application almost imperative may not be out of place.

This suit was instituted *in equity* by petitioner against a number of stockholders of an insolvent Minnesota corporation residing in Pennsylvania to recover a statutory stock liability. After a decree dismissing the bill in the circuit court, affirmed by the circuit court of appeals for the third circuit, application for *certiorari* was made and granted by this court.

The questions involved were three: (1) The right of enforcement of the liability in foreign jurisdictions, (2) the right of the petitioner as representative of creditors to maintain the suit, and (3) jurisdiction in equity.

Pending the determination of this cause, there was instituted by petitioner, in the circuit court for the northern district of New York, *an action at law* against one Hilliker, to recover the same statutory liability. Judgment in favor of petitioner in that case in the circuit court was reversed by the circuit court of appeals of the second circuit upon two grounds: (1) Denial of the receiver's right to sue, and (2) the application of a special statute of limitations of the State of New York. Application for *certiorari* was thereupon made to this court, and the same held under advisement pending the decision in the case at bar. The holding of this court denying the right of petitioner to sue disposed of that question in the Hilliker case, and resulted in a denial of the application.

In various of the circuit courts judgments have been rendered and are presently outstanding in favor of your petitioner as receiver in similar cases (except that the proceed-

ings have been brought at law), aggregating approximately $200,000, all whereof are pending on writs of error.

Other causes pending in various of the circuit courts undetermined, brought by your petitioner at law, would increase this total by approximately $100,000.

These sums are exclusive of the claims involved in this case against stockholders in the Commonwealth of Pennsylvania, and the Hilliker case, involving over $75,000.

The fund contemplated in these liabilities is the only substantial asset for the creditors involved in this most unfortunate insolvency. This asset has been practically wiped out by the decision of the purely technical question of the right of the receiver to sue.

At the time this litigation was inaugurated the law relating to the foreign enforcement of liabilities of this class was surrounded with almost every phase of doubt and uncertainty. For six years the creditors, proceeding through the receiver, petitioner here, have constantly pressed the determination of the ultimate questions involved. The resulting decisions have been inharmonious in an almost unparalleled degree. At the expiration of this time, with the probable intervention of the statute of limitations, the denial of the right of creditors, on the technical ground of the right or capacity of the receiver to sue, is a practical denial of any and all relief.

If the situation were merely one of alternative or substitution of remedies or forms of procedure, the question would be fraught with far less significance. As the matter stands, for reasons hereinafter explained, this is not the fact, and if the decision of this court shall be ultimately adhered to, as regards the right of the petitioner as receiver to sue, no effectual remedy for the creditors of this insolvency will remain.

The far-reaching consequences of the present decision furnish ample justification for the presentation of this application.

While considerations based upon the situation of a particular litigation may not of themselves present reasons for invoking a reconsideration at the hands of the court, and while the unfortunate condition of the creditors in this insolvency may not be sufficient to justify relaxing ordinary rules of procedure, they may and should justify the court in exercising the discretion which it possesses, and in reconsidering a question which has been and is in a state of utmost confusion when a comparison of the Federal and State decisions be had. Especially should this be true in a case where the decision of this court was based on considerations *of local and not general law*, and where, as will be presently shown, the local law was erroneously interpreted, owing to a misconception of the decisions of the local jurisdiction.

GROUNDS OF APPLICATION.

Misinterpretation of the Minnesota Court.

In disposing of the question of the right of petitioner to sue as receiver in the courts of a foreign jurisdiction, this court had recourse to the following Minnesota decisions:

Allen *vs.* Walsh, 25 Minn., 543.
Palmer *vs.* Zumbrota, 65 Minn., 90.
Minneapolis Base Ball Company *vs.* State Bank, 66 Minn., 441.
Hanson *vs.* Davison, 73 Minn., 454.

These decisions were reviewed and it was held that previous to the decision in Hanson *vs.* Davison, *supra*, the uniform construction of the local law, by the courts of Minnesota, had established that the receiver had no right to sue for the purpose of enforcing the statutory liability of stockholders.

This construction was held by this court to have been apparently modified in Hanson *vs.* Davison, but that case was

held not entitled to the consideration otherwise obtaining, because (1) whatever was said therein relative to the right of the receiver was obiter; (2) the decision was made subsequent to the insolvency in the case at bar, and (3) it did not expressly overrule the prior cases. This will appear from the following, quoted from the opinion of this court, at pages 6 and 8:

"Whatever was said in the opinion regarding the possible right of a receiver to maintain such an action as the one now before us, was not necessary to the decision of the case, and cannot be regarded as overruling the prior cases. The opinions in The Minneapolis Base Ball Company *vs.* Bank, and in Hanson *vs.* Davison, were written by the same judge, and in the latter case he does not refer to the earlier one decided but two years before, and which held that a receiver under the State statute could not maintain such an action as this" (page 6). * * * "We should not, therefore, be justified in following the remarks made in this case, in opposition to those cases, which had already been decided by the same court years before, and up to and including The Minneapolis Base Ball Company *vs.* Bank (*supra*), especially when it appears, as in this case, that all the facts had occurred prior to the declaration of the chief justice of the court" (page 8).

If these statements correctly indicated the status of the local law, we would readily assent to the conclusions announced.

Conversely, if the statements are erroneous, the conclusions are without support.

The decision of this court tacitly concedes that if Hanson *vs.* Davison were not opposed to the prior established rules, this court would be justified in according due weight to what was therein stated on this question of *strictly local import.*

That this court has misconceived the meaning of the Minnesota holdings, and that its misconception has resulted in an entirely unwarranted and erroneous interpretation of the local law may be readily demonstrated.

Hanson *vs.* Davison neither qualified, modified, or overruled any of the prior decisions referred to by this court. The receiver referred to in the cases cited by this court, antedating Hanson *vs.* Davison, *is not the same receiver at all as the receiver referred to in the Hanson case.*

By failing to distinguish two perfectly well-defined classes of receivers the entire substantive law as embodied in the legislative enactments of that State and their interpretation by the highest court thereof has been confused and misinterpreted by this court.

All the Minnesota cases cited, including Hanson *vs.* Davison, are in perfect harmony and accord, so far as the question of the right of a receiver is concerned, and no possible justification can be found for a contrary claim.

We may premise this assertion by the general statement that the receiver referred to in the several cases prior to Hanson *vs.* Davison was *the general receiver of the corporation.* The receiver referred to in the opinion of the chief justice in the Hanson case *was the special receiver* contemplated by the statutes of Minnesota to be appointed as the representative of creditors in the proceeding inaugurated *exclusively for the enforcement of the stock liability.*

These two receivers are entirely separate, both in matter of fact and law. They have no offices or functions in common. The property and rights available by one are in nowise available by the other. The receiver of the corporation, as referred to in the Minnesota cases previous to Hanson *vs.* Davison, was the general receiver appointed in insolvency or equitable sequestration proceedings for the purpose of administering the corporate assets and affairs.

In the cases antedating Hanson *vs.* Davison the question was presented whether *this general receiver* could sue to recover the statutory stock liability, and the rule was an-

nounced that the statutory liability of stockholders to creditors was a matter in which neither the corporation nor *its receiver* had any right or concern.

This is the settled rule of law in that State, and it follows and was held accordingly in all the cases cited that, having no right or interest in the liability in question, *the receiver of the corporation* cannot sue for its enforcement.

To the cases cited in the opinion of this court may be added Olson *vs.* Cook, 57 Minn., 552, wherein this point was also expressly passed upon. Petitioner, the receiver in the case at bar, *is not the receiver of the corporation*, and has no functions whatsoever appertaining to that office. Whatever of limitation upon the authority of such general receiver may exist, therefore, by force of the Minnesota decisions, is in nowise governing or determinative of petitioner's status or rights.

It is essential, in order to correctly interpret the meaning of the Minnesota decisions, to understand these separate and distinct receiverships. The one, the receiver of the corporation; the other, the special receiver *appointed in the creditors' suit exclusively for the enforcement of the stock liability.*

No case cited by this court previous to Hanson *vs.* Davison had any reference whatsoever to the special receivership in the stockholders' suit. Every one of those cases referred to the receiver of the corporation, and was confined to holding, in substance, that as between such receiver, on the one hand, and the corporate creditors, on the other, the right to enforce the stock liability was in the latter.

When we reach the case of Hanson *vs.* Davison the converse of the situation exists. In that case there was no question of the right of the general receiver of the corporation. It cannot, therefore, be held that Hanson *vs.* Davison overruled, modified, or was in anywise inconsistent with the previous cases. In the Hanson-Davison case the right of the receiver of the corporation was neither involved nor alluded

to at any stage of the case until the wholly irrelevant reference in the dissenting opinion.

In that case a receiver of the corporation had been appointed and had administered the corporate affairs as in the case at bar. There, as also here, the creditors had asserted their rights as against the stockholders in an equitable proceeding, which had gone to judgment, and to the appointment of the special receiver as an incident of that suit. In referring, as did the opinion of the Chief Justice of the court in that case, to the right of the receiver, reference was had solely to the only receivership which by any possibility could be involved in the stockholders' suit proper, viz., *the special receiver therein appointed.* This clearly appears from the following language quoted from the opinion of the Chief Justice in that case:

"There is nothing to prevent the prosecution after such decree is entered of an ancillary action in any other jurisdiction by *the receiver appointed to collect and distribute the fund arising from the stockholders' liability in the original action, &c.*"

As the "original action" here referred to is that instituted by the creditors to enforce the liability of stockholders (an action in which the receiver of the corporation has no right), it is clear that the language is susceptible of but a single interpretation.

The confusion indicated in the opinion of this court arises from a failure to distinguish between these two separate and distinct receiverships and an indiscriminate application of the precedents without regard to the distinction noted. The perfectly well settled construction of the statutes and practice adopted and applied thereunder by the courts of that State, if correctly interpreted and understood, will readily dispose of the confusion indicated.

At the risk, therefore, of some degree of repetition, we may be pardoned for a brief outline which will serve to

clear the atmosphere and demonstrate to this court that it has erroneously interpreted the local law, and has made this erroneous interpretation the basis of decision in the case at bar.

Under the laws of Minnesota three methods exist for liquidating the affairs of an insolvent corporation. First. By voluntary assignment for the benefit of creditors. This is simply a statutory adaptation of the statutes of Elizabeth governing common-law assignments. Second. By proceedings in insolvency, which may take on the form of voluntary or involuntary proceedings, the statute in this regard being in the nature of a local bankrupt act. Third. By what are termed equitable sequestration proceedings, as regulated by chapter 76, General Statutes of Minnesota, 1894.

All have one feature in common, viz., the administration of the assets and affairs of the corporation. The assignee under a voluntary assignment or in insolvency, the receiver appointed by the court in insolvency, or in the equitable sequestration proceedings, represents and succeeds by virtue of his office *to the rights and interests of the corporation.*

His succession, however, does not include any interest in the statutory liability of stockholders. The last is interpreted as strictly an asset belonging to creditors and as such enforceable by them and not by the receiver of the corporation.

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As a result of this settled interpretation, *the administration of the corporate affairs and the enforcement of the stock liability by the creditors* are wholly distinct and independent proceedings.

The funds are separate and separately administered. The creditor interests may or may not be the same in both, depending upon the voluntary action of the creditors themselves in coming into one or both.

The suit to enforce the stock liability is inaugurated by the creditors themselves or by some in behalf of all, according to the established rules of equity proceedings. The corporation and stockholders within the reach of process are brought before the court, creditors are summoned by notices requiring intervention, an account is had and taken of the debts and assets, and the resulting ascertainments are embodied in the final decree in which is also adjudged the personal liability of the stockholders before the court.

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At this point in what is termed the original proceeding to enforce the stockholders' liability, the requirement of the *special receivership in that suit*, and in order to effectuate the purposes thereof, first arises.

This receivership is confined in its objects and purposes to matters incident to the collection and enforcement of the stock liability. These propositions are perfectly well established and thoroughly understood in the local jurisdiction of Minnesota.

Notwithstanding this well-settled distinction, this court, referring to the line of decisions in Minnesota relating exclusively *to the general receiver of the corporation*, and holding that *such receiver* cannot sue to enforce the stock liability, states as *an established principle of local law* that the special receiver is denied the right to sue.

An analysis of the leading cases cited by this court, with certain others explanatory of the holdings therein, will serve to make the proposition herein plain.

Allen *vs.* Walsh, 25 Minn., 543, was the first case in that State containing any authoritative announcement of the nature and character of the stock liability. There was no question of receivership in that case.

A single creditor of an insolvent bank sued *a single stockholder* to recover the liability. Demurrer was interposed to

the complaint and sustained. In the course of its opinion the court explained that the liability was one intended equally for all creditors in common and to be enforced accordingly in equitable proceedings, as indicated by the provisions of chapter 76, General Statutes of Minnesota for 1866, this statute being the same as that now appearing in the compilation of 1894.

The sole question involved in that case, therefore, was whether a single creditor could enforce the liability in his own behalf against a single stockholder.

So far as that case held that no such right existed, that the rights of creditors were equal, and that they were to be enforced in proceedings for the benefit of all, it has remained and is the settled law of that State.

HANSON VS. DAVISON, SUPRA.

The provisions of chapter 76 referred to, as hereinafter shown, embrace proceedings to wind up the affairs of the corporation as well as to enforce the stock liability.

In Arthur *vs.* Willius, 44 Minn., 409, the proceeding was inaugurated by creditors under this statute to liquidate the affairs of the corporation. In that case a creditor intervened and filed a supplemental complaint to enforce the statutory liability of stockholders. This practice was sustained by the Supreme Court. This decision indicated what, in the absence of express authoritative announcement, had come to be accepted in practice, viz., that the right to sue for the stock liability appertained to the creditor, and could not be availed of by the receiver of the corporation. It remained, however, for later cases to expressly announce the rule.

In Olson *vs.* Cook, 57 Minn., 552, the question was set at rest, so far as proceedings inaugurated against the corporation in insolvency were concerned. In that case a receiver of the corporation had been appointed under the insolvent law of the State. Pending the administration in insolvency,

Olson, a creditor, filed his bill in behalf of himself and all other creditors to enforce the stock liability. The defendants pleaded another action pending, and contended, in support of the plea, that the liability was available in the insolvency proceeding. The plea was overruled, the court holding that the stock liability was not impounded in the insolvency proceeding; that it was not a corporate asset; that there was no machinery in the insolvent law for its enforcement, and, as a necessary conclusion, that *the only receiver provided by that law*, viz., the receiver of the corporation, had no right to sue. The remedy pursued by Olson in behalf of creditors, according to the provision of chapter 76, was held proper, notwithstanding the contemporaneous proceeding in insolvency *to administer the corporate affairs*. While the provisions of chapter 76 were recognized as embracing both classes of proceedings, viz., against the corporation to liquidate its affairs and against stockholders to enforce the stock liability, it was held that where the occasion for resorting to this statute for the former relief was precluded by proceedings inaugurated under the insolvent law, the remaining provisions relating to the enforcement of the stock liability were still applicable, and indicated the proceeding to be adopted by creditors.

This was the first definite and authoritative announcement relative to the right of a receiver, and here, as shown by the case, the receiver was *the receiver of the corporation in insolvency*.

This still left as an open question whether *the receiver of the corporation* appointed in proceedings under chapter 76 could sue in those proceedings to enforce the stock liability.

In Palmer *vs.* Zumbrota, 65 Minn., 90, this last question arose in the following manner: Palmer filed his bill against the corporation for the appointment of a receiver therefor under chapter 76. The bank made default, and a decree was entered confirming the appointment of the temporary receiver and making the same permanent. By the same de-

cree it was provided that the receiver (of the corporation) should sue the stockholders to enforce the stock liability. Subsequent to the decree, but before any action had thereunder, one Thacher, a creditor, applied to the court in the original proceeding for leave to file a supplemental bill bringing in stockholders to enforce the stock liability. Leave was granted, the supplemental bill filed, and notices given creditors to intervene.

Palmer, the original creditor, thereupon appeared and moved to vacate the order permitting the filing of the supplemental bill. This motion was denied. The defendant bank appeared and moved to vacate the judgment directing the receiver to sue the stockholders. This motion was also denied.

The stockholders demurred to Thacher's supplemental bill, amongst others, on the ground of another action pending brought by Palmer.

The several rulings were incorporated in a single appeal to the supreme court. The third appeal related to the receivership, and arose on the objection of the defendant bank to the portion of the decree directing the receiver of the corporation to sue. This point was disposed of by the court by holding that while the decree originally directing suit by the receiver was erroneous, the subsequent order granting Thacher's application to file a supplemental bill against stockholders practically abrogated the part of the decree complained of.

Here the receiver was one appointed under the provisions of General Statutes 1894, chapter 76, section 5902, referring *exclusively* to receivers of the corporation, and having no reference to the receiver appointed under the sections of the statute relating *exclusively* to the stock liability.

In Minneapolis Base Ball Co. *vs.* State Bank, 66 Minn., 441, the proceeding was inaugurated under chapter 76, and *a receiver of the corporation* appointed. Thereafter creditors filed in the same proceeding a bill to enforce the stock liability.

This was followed by a motion to make the stockholders parties defendant to the latter bill. On objection by the receiver the motion was denied, the lower court holding that the receiver of the corporation could bring the suit. From this order an appeal was taken and the question squarely presented whether the receiver of the corporation or the creditors should inaugurate the stockholders' suit. Upon this point the Supreme Court say:

"Has *a receiver of a corporation* appointed in sequestration proceedings under G. S. 1894, chap. 76, authority to enforce the personal liability of stockholders for the debts of the corporation? We answer this question in the negative."

Up to this point it will be observed that the questions presented to and decided by that court have been confined to deciding that the appointment of *a receiver for the corporation* does not impound or sequestrate the asset involved in the stock liability. As between that receiver and the creditors, the right of suit is in the latter, and the method of procedure is regulated by the provisions of chapter 76, *supra*, applicable to this proceeding.

We start with this as a fixed and settled principle of the local law. Conformably thereto the bill is filed by creditors against the corporation and all stockholders within the reach of the court's process to enforce the stock liability.

That suit proceeds to a decree in favor of all creditors in interest. An accounting of the debts and assets is had, the resulting deficiency ascertained, immediate decrees are rendered against the stockholders before the court, and a receiver appointed as representative of creditors.

The questions then presented are two: (1) Does the statute authorize such an appointment? and (2) What are the powers of the receiver thus appointed?

To decide these questions as this court has in the case at bar, by reference to the cases reviewed above, is to make

their decision dependent on something wholly foreign and having absolutely no bearing on their solution.

These questions are wholly beyond and aside from anything involved in the previous cases. The statute providing for the appointment of a receiver of the corporation and defining his powers is one thing, the statute governing the proceeding for enforcing the stock liability is another. The solution of the questions here arises exclusively under the latter.

In assuming that these questions were foreclosed by precedents in the local jurisdiction adverse to petitioner's claim this court was clearly in error.

As far as we have proceeded in this analysis, the question is *clearly open*.

It remains therefore to be ascertained how far the local precedents have gone in the solution of these questions.

In Harper *vs.* Carroll, 66 Minn., 487, which was a suit by creditors against stockholders as in the case at bar, a special receiver was appointed with powers similar to petitioner.

In speaking of the character of this appointment the Supreme Court said in that case:

"The statute provides for the appointment of a receiver and this implies that his expenses may be recovered," etc.

This is an express recognition of the claim made that the provisions of the General Statutes Minnesota, 1894, chap. 76, sec. 5906, "and shall appoint one or more receivers," is a statutory authorization for the appointment of the receiver in the stockholders' suit.

Next in order is Hanson *vs.* Davison, *supra*, which has already been explained.

Lastly is the practical construction adopted and acted upon in the actual application of these laws in practice, to be later referred to.

In the light of this review one of two resulting alterna-

tives must be conceded, either (1) these later decisions, supplemented by the practical construction adopted by the local courts, are sufficiently indicative of the proper interpretation and purpose of the local law to be accorded controlling weight, or (2) *the construction of the law is still an open question.*

If the former alternative be accepted, the decision of this court on the question of local law is erroneous, because of obvious misconception of the precedents.

If the latter alternative be adopted the present decision is wrong, because this court has failed to construe or interpret the local law, erroneously assuming that such construction was foreclosed by local precedent.

APPLICATION OF DOCTRINE OF COMITY.

This court disposed of the subject of comity in its opinion by the following cursory statement:

"The question of comity cannot avail in a case where the courts of the State in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the State of his appointment."

This statement was obviously based on the error in the interpretation of the Minnesota cases hereinbefore shown. If the application of the now generally prevailing rule of comity be doubted on the grounds stated in the decision of this court, seemingly a clear distinction should be made between denial of power and *want of occasion for its exercise,* in the interpretation of the local law.

This distinction is clearly illustrated by the decision in Hanson *vs.* Davison, *supra.* In that case two points were decided having important bearing upon the question under consideration. After holding that the judgment of the court in the original action was conclusive on all omitted

stockholders, on the ground of representation in the person of the corporation, the court held (1) that an ancillary action against an omitted stockholder *within the jurisdiction* of the court was not necessary, and that the proper remedy was by proceedings had and taken to bring such stockholder into the original action, and (2) that there was nothing to prevent the maintenance of ancillary actions abroad as against foreign stockholders who could not be thus brought in.

We have already explained that the original action is inaugurated by the creditors and that the occasion for the appointment of the receiver in that action first arises at the time of the decree. The holding referred to is, therefore, susceptible of the conclusion that as against an omitted stockholder *within the Minnesota jurisdiction*, and who can be brought into the original proceeding there pending, such receiver should not inaugurate separate ancillary actions.

This is clearly not *a denial of power*, but a rule of practice based upon conceived *expediency in matter of procedure*. The original action is intended, as held frequently by the courts of that State, to be sufficiently comprehensive to bring in all parties within the reach of the court's process. The rule announced is one of expediency and economy, calculated to protect the estate and fund from excessive costs otherwise involved in the institution of ancillary actions.

No one has ever doubted that it is within the power and jurisdiction of a court of equity to direct its receiver to proceed, if it be so advised, by separate and ancillary proceedings for the collection of different parts of a fund or estate confided to its administration (Peck *vs.* Elliott (C. C. A.), 79 Fed. Rep., 10, and cases).

Yet to hold in the case at bar, as a result of Hanson *vs.* Davison, that the receiver has no right in the home forum, would be to deny to the Minnesota court the possession of the power where the case only warrants the conclusion that its exercise has been dispensed with on grounds of expediency.

Prior to 1900 the statutes of Ohio were substantially identical with those of Minnesota as respects this class of liabilities. After a decree in an original stockholders' suit instituted in that State, and the rendition of judgments therein against local stockholders, suit was brought in the courts thereof by the receiver appointed in that proceeding to reach property fraudulently conveyed by one of the stockholder defendants. In this case the right and measure of the receiver's authority as a statutory officer was sustained by the supreme court of that State in Zieverink *vs.* Kemper, 34 N. E. Rep., 250.

In Kirtley *vs.* Holmes, 107 Fed., 1, *supra*, a receiver appointed by the court of Ohio under this statute in a suit to enforce the liability of stockholders there pending brought suit against a non-resident stockholder in a foreign jurisdiction.

In this case the circuit court of appeals of the sixth circuit, in an unanimous opinion announced by Day, J., used the following pertinent language:

"The action being for the benefit of all the creditors, and having been instituted upon that theory in the Ohio court, which is to ascertain the amount to be assessed against stockholders, and the creditors entitled to the benefit thereof, we think it is in harmony with the usages of equity to appoint a receiver who shall, under the direction of the court, bring an action in order to bring into the fund sums arising from the liability of stockholders beyond the jurisdiction of the court. The cause of action exists in favor of all creditors. It may be impracticable to unite all in the bringing of the action. A court of equity, in the exercise of its power to appoint a receiver, may well appoint one for the purpose of reaching such outstanding liabilities. The right of such a receiver appointed in another jurisdiction to maintain an action, has been recognized upon principles of comity, where no injustice would be done to the citizens of the local jurisdiction, or his recognition conflict with public policy."

Subsequent to the announcement of the opinion of the circuit court of appeals of the first circuit in Hale *vs.* Hardon, the legislature of Ohio amended its statute so as to practically conform to the requirements of the holding in the Hardon case. Those matters which were held by the court in that case to have been fairly implied from the language of the Minnesota statute were incorporated in the Ohio amendment in express terms. The inauguration of the proceeding by creditors in the first instance is left as before; the accounting of the debts and assets and ascertainment of the amount necessary to be contributed by stockholders, the immediate judgments in the original proceeding against local stockholders, and an express authority to the receiver appointed by the court in that suit to sue non-residents are provided for.

This act, as amended, was considered in the circuit court of the Indiana district in Burr *vs.* Smith, 113 Fed., 858, by Baker, J., and the right of the special receiver, appointed by the Ohio courts in the original action, to sue in foreign jurisdictions was expressly sustained.

Under the proceeding thus provided the special receiver contemplated is not empowered *to sue resident stockholders.* There is no occasion for the exercise of such power, for there, as in Minnesota, the original proceeding brought by creditors may be opened up and extended so as to reach every stockholder within reach of the court's process.

This amended statute expresses no more than is fairly inferable from the Minnesota law in question.

The supreme court of Maine in Childs *vs.* Cleaves, 95 Me., 498, well said that if the receiver's right was denied there was no one who could enforce the liability, and that recognition and standing would be accorded on the ground of comity.

Judge Putnam, in the circuit court for the Massachusetts district, said that the Maine court in the case cited evidently misconceived the character of the receiver, and considered

it as a different office from that presented in the Hale cases; but the Maine court reaffirmed its previous holding, notwithstanding the doubts expressed by the learned circuit judge, in Hale *vs.* Cushman, 96 Maine (51 N. E. Rep., 874).

CONCLUSION.

1. If this were a question of general law, more hesitation might be felt in pressing these views; but this court is construing a local law of Minnesota, and we submit that it should hesitate at a construction which will operate to practically nullify its objects and purposes. To deny efficacy to the spirit and purpose of the law as respects the right of the receiver to sue is to deny the existence of one of the most, if not the most essential features embodied in its provisions and to subvert those very objects and purposes without which the scheme and plan therein proposed is impossible of fulfillment.

This court has apparently assumed that the objects of the law may be fully subserved by confirming the right of creditors themselves, as contradistinguished from the receiver, to maintain supplementary actions in foreign tribunals.

It is settled that no original jurisdiction exists in such foreign courts.

Bank *vs.* Sayward (C. C. A., First Circuit), 91 Fed. Rep., 443.

Bank *vs.* Northwestern Guaranty Loan Co. (C. C. A., Third Circuit), 87 Fed. Rep., 252.

Post *vs.* Railroad, 144 Mass., 341.

Cleveland *vs.* Railway, 34 N. Y. Sup., 427.

The supplementary proceeding accords with the spirit of the law and its construction by the local courts.

One of the paramount purposes of the law is to provide a uniform method of administration. To accomplish

this the action in the home forum of the corporation is treated as the original, and all others auxiliary or dependent. The creditors are brought into this original action and their rights submitted to the jurisdiction of the court therein. In this manner the local court obtains control of the proceeding in its entirety.

If after the decree in this cause the whole matter is thrown open, if no power exists, by statute or otherwise, to direct and control subsequent proceedings, the obvious purpose of the plan devised by the statute fails.

It is no answer to this to say that the creditors may sue in foreign jurisdictions. What creditors shall sue? Will each foreign court in which such proceeding is inaugurated undertake to administer and distribute the fund? Will it be administered for all the creditors who have established their claims in the original proceeding, or for those only who have voluntarily come into these numerous supplemental proceedings?

These considerations may not be decisive. They should be accorded due weight when this court comes to interpret the Minnesota statute, as it must if it shall conclude that the precedents of that State are not sufficiently indicative of their construction.

If the local law provides for the appointment of a receiver in this stockholders' litigation as the supreme court of that State has held, and if the purposes of the law cannot be carried out and effectuated without power to sue in such receiver, *that power will be implied.*

As said by Mr. High:

"But to warrant them in the exercise of a power, it need not be expressly conferred, and if it can be fairly implied either from the general scope and purpose of the statute, or as an incident to a power expressly given, there is sufficient warrant for its exercise."

High on Receivers (3d ed.), sec. 322.

As indicating an implied denial of the receiver's capacity to sue, this court said, in its opinion referring to the Minnesota precedents:

"There is no holding that the statute itself provides in terms for such an action or empowers a receiver to maintain it, etc." (page 8).

Had this statement been made prefatory to and as a justification for an independent construction of the statute, with a view to ascertaining whether it contemplated such an appointment and the investiture in the receiver of the power in question, no criticism could have been made; but it was not. On the contrary, as shown by the context, it was stated as confirmatory of what was assumed to have been settled by previous cases in that State, viz., *that the receiver had been held to have no right to sue.*

There has been thus by the decision of this court engrafted upon the Minnesota law a construction as clearly opposed to the purposes of that law as the decisions relied upon are foreign to the point upon which they are cited. Thus this court has found and promulgated for Minnesota a condition of local law which never existed in that State, has based its holding upon precedents that have neither relevancy nor bearing, and has thereby established a decisive point in this cause.

2. We have already stated, in the briefs presented to this court, the practical construction placed upon the statute in actual practice in the courts of Minnesota; and if corroboration of our statement in this respect were necessary, the records of various cases might be pointed to, notably Childs *vs.* Cleaves, 95 Maine, 498; Finney *vs.* Guy, pending on writ of error to the supreme court of Wisconsin, at the present time in this court, as well as the receivership in the case at bar, all of which were of identical character, arose in the stock-

holders' litigation, were predicated on the same statute and invested in the receivers similar rights of suit.

In addition to the foregoing the writer is able to state of his own knowledge the stockholder receiverships of Carroll in the failure of the Citizens' bank and of Ueland in the receiverships of the Scandia bank, in both whereof similar powers were granted the receivers and foreign proceedings thereunder inaugurated, which were settled or compromised before trial. Several of these cases have been before the supreme court of that State, and in no one thereof was it ever suggested that the statutory powers had been exceeded. On the contrary, in one thereof—Harper *vs.* Carroll—that court, as hereinbefore stated, upheld the receiver's appointment as made under the statute. This element of practical construction may not be decisive, but is entitled to consideration in the interpretation of the local law.

3. It is admitted on all hands that the local law binds the creditor interests and prescribes the conditions without compliance wherewith those interests have no standing to assert the liability.

This phase of the local law seems to have been entirely lost sight of in the decision in the case at bar.

The creditor interests submitted themselves to the jurisdiction of the Minnesota court. They prayed by their bill the appointment of a receiver as the common representative.

When that court pronounced its decree and vested those creditor interests to all practical intents and purposes in the receiver, what effect should be accorded its action? In the first place, it took the collection of the judgments actually rendered out of the hands of the creditors and gave that right over exclusively to the receiver. No creditor after this decree could have inaugurated any supplementary proceeding to enforce that judgment. The matter was exclu-

sively placed within the control of the receiver. The same authority and control was conferred as respects non-resident claims.

This decree was binding on every creditor to that proceeding, and therefore on the only creditors having any interest in the enforcement of the liability.

The creditors are as much bound by these provisions as any others contained in the decree. They have neither right nor authority to interfere with the receiver's administration. That decree is seemingly as binding upon the creditor in a foreign as in a domestic tribunal. If a suit were today instituted by creditors, they would be met with the objection that the right had been vested by the decree, to which the creditors were parties, in the receiver in such manner as to estop the creditors from suing (Castleman *vs.* Templeman (Md.), 41 L. R. A., 367, 369).

4. The case of Evans *vs.* Nellis, cited in the opinion of this court, presents considerations entirely inapplicable to the case at bar. That case arose under the laws of Kansas. At the time the stock was subscribed for the law of Kansas prescribed a several and independent remedy in favor of creditors (considered by this court in Whitman *vs.* Bank, 176 U. S., 559). Prior to the institution of the Evans suit this law was modified, and the right to enforce the liability devolved upon the receiver of the corporation.

As interpreted by the Kansas court, the right of the receiver was conditioned upon action by the local court in the nature of an assessment. The receiver in the Evans case sued a stockholder in the circuit court for the northern district of New York to recover the liability *without performance or showing of the requisite condition precedent.*

Upon this state of facts there was certified to this court the question whether the receiver had any right or power to sue. This court answered that question in the negative.

No such question arises or is presented in the case at bar. There is here no question but that the requisite conditions precedent have been performed. The question here is whether, after such conditions exist, the receiver, by force of the statute and decree of appointment, is entitled to foreign recognition and standing as the common representative of creditors.

For the reasons hereinbefore stated, it is submitted that the court in this case is in error in the interpretation of the local law of Minnesota, and as the error referred to has been made the basis of deciding the case at bar, a rehearing should be granted according to the prayer of the annexed application.

Respectfully submitted.

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